Zung Zang Wood Products Sdn Bhd & Ors V Kwan Chee Hang Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS 2-02–3404 OF 2010 AND S-02–3405 OF 2010
LOW HOP BING, MOHD HISHAMUDIN AND BALIA YUSOF JJCA
29 MARCH 2012

Civil Procedure — Pleadings — Fraud — Whether plaintiffs had sufficiently pleaded allegations and particulars of fraud against defendants — No application by defendants for further and better particulars of claim nor objection to evidence adduced by plaintiffs — Whether unnecessary for court to consider defence of non est factum if fraud against defendants established

The second and third respondents were the parents of the fourth appellant ('Mathew') whose wife was the fifth appellant ('Elain'). The first, second, third and sixth appellants were companies controlled by Mathew and Elain. The first respondent ('KCHSB') was founded by the second and third respondents and was the ultimate holding company of the first three appellants. The second respondent ('PW2') entrusted the management and finance of KCHSB to Mathew as managing director ('MD') after his elder son relinquished that post. During Mathew's tenure as MD he caused KCHSB to acquire the first, third and sixth appellants as its subsidiaries. Then, using the funds of KCHSB and its subsidiaries and some bank borrowings, Mathew caused the third and sixth appellants to acquire huge tracts of land for planting oil palm. PW2, who was illiterate in English, had signed corporate documents, including circular resolutions, under the impression the acquired lands were registered in KCHSB's name, unaware that Mathew had registered the lands in the names of the subsidiaries. It was later discovered that all plantation land owned by KCHSB and its subsidiaries were controlled and owned by Mathew and Elain. Mathew undertook various corporate manoeuvres to benefit himself and Elain including: (i) delaying completion of the Group Audited Accounts of KCHSB and its subsidiaries for several years to avoid being found out about his wrongdoings; (ii) wrongfully retaining KCHSB's accounting books, records and minute books; (iii) fraudulently and illegally diluting the assets of KCHSB and its subsidiaries to benefit himself and his wife; (iv) causing the third appellant to acquire plantation lands without PW2's knowledge; and (v) wrongfully converting for his own use 1.6m shares owned by KCHSB in a company ('the Tekala shares') and pledging them to a third party as security for loans. KCHSB individually and jointly with PW2 and his wife brought three suits against Mathew, Elain and the appellant companies seeking various reliefs. These included an order that PW2 be reinstated as director of the first, second and third appellants, an injunction to restrain Mathew and Elain from

dealing with certain lands, damages for losses suffered as a result of their actions and an order that Mathew return the Tekala shares to KCHSB or pay damages for their wrongful conversion. The plaintiffs also sought declarations that: (i) KCHSB was the legitimate and beneficial shareholder of the issued shares of the first and second appellants; (ii) KCHSB and/or the first appellant were the legitimate and beneficial shareholders of 80% of the issued shares of the second appellant; and (iii) KCHSB and/or the second appellant were the legitimate and beneficial shareholders of the issued shares of the third appellant and of the 170,000 issued shares of the sixth appellant. The High Court granted judgment to the respondents in all the three suits which were tried together. The appellants appealed against the decisions to the Court of Appeal.

Held, dismissing the appeals with costs:

(1) The respondents' respective statements of claim sufficiently set out the allegations and particulars of fraud including elements of equitable fraud. At the High Court the appellants did not apply for further and better particulars of the claims and in the instant appeals, no objection was raised as to the evidence adduced for the respondents. Hence, the complaint that the respondents had not specifically pleaded and particularised fraud was devoid of merit (see paras 23, 26, 28–29).

(2) There was no error in the trial court's finding of facts and application of law governing limitation. All three suits were filed within the prescribed limitation period (see paras 38 & 32).

(3) The trial court's finding of fraud against the appellants was clearly supported by the evidence. As fraud had been established, it was unnecessary for the Court to consider the defence of *non est factum* raised by the appellants (see paras 64 & 68).

(4) The trial court was correct in holding the respondents had proved Mathew's wrongful conversion of the 1.6m Tekala shares belonging to KCHSB (see para 71).

(5) The High Court was right in drawing an adverse inference against the appellants under s 114(g) of the Evidence Act 1950 on Elain's failure to testify during the trial. She had a duty or obligation to explain to the court how she and Mathew had acquired joint ownership of the entire plantation land (see paras 72–73).

[Bahasa Malaysia summary

Responden-responden kedua dan ketiga merupakan ibu bapa perayu keempat ('Mathew') yang mana isterinya adalah perayu kelima ('Elain'). Perayu-perayu pertama, kedua, ketiga dan keenam adalah syarikat-syarikat yang dikawal oleh Mathew dan Elain. Responden pertama ('KCHSB') telah diasaskan oleh responden-responden kedua dan ketiga dan merupakan syarikat pegangan

utama tiga perayu pertama. Responden kedua ('PW2') telah mengamanahkan pengurusan dan kewangan KCHSB kepada Mathew sebagai pengarah urusan ('PU') selepas anak lelaki sulungnya melepaskan jawatan tersebut. Semasa Mathew memegang jawatan sebagai PU dia telah menyebabkan KCHSB memperoleh perayu-perayu pertama, ketiga dan keenam sebagai syarikat subsidiarinya. Kemudian, menggunakan wang KCHSB dan syarikat subsidiarinya dan sedikit pinjaman bank. Mathew telah menyebabkan perayu-perayu ketiga dan keenam memperoleh kawasan tanah yang luas untuk menanam kelapa sawit. PW2, yang tidak memahami Bahasa Inggeris, telah menandatangani dokumen-dokumen korporat, termasuklah resolusi pekeliling, dengan andaian tanah-tanah yang diperoleh telah didaftarkan atas nama KCHSB, tanpa menyedari bahawa Mathew telah mendaftarkan tanah-tanah itu atas nama syarikat-syarikat subsidiari tersebut. Hanya selepas itu disedari bahawa semua ladang tanah yang dimiliki oleh KCHSB dan syarikat-syarikat subsidiarinya dikawal dan dimiliki oleh Mathew dan Elain. Mathew melakukan pelbagai pemesongan korporat yang mendatangkan faedah kepadanya dan Elain termasuklah: (i) melengah-lengahkan persiapan Akaun Kumpulan Yang Diauditkan untuk KCHSB dan syarikat-syarikat subsidiarinya selama beberapa tahun bagi mengelakkan daripada diketahui tentang salah lakunya; (ii) secara salah menyembunyikan buku-buku akuan, buku-buku rekod dan minit KCHSB; (iii) secara fraud dan menyalahi undang-undang mencairkan aset-aset KCHSB dan syarikat-syarikat subsidiarinya untuk keuntungannya dan isterinya; (iv) menyebabkan perayu ketiga memperoleh ladang tanah tanpa pengetahuan PW2; dan (v) secara salah menukar penggunaannya sendiri untuk saham 1.6 juta yang dimiliki oleh KCHSB dalam syarikat ('saham Tekala') dan mencagarkannya kepada pihak ketiga sebagai cagaran untuk pinjaman. KCHSB secara berasingan dan bersama dengan PW2 dan isterinya telah memulakan tiga guaman terhadap Mathew, Elain dan perayu syarikat-syarikat memohon pelbagai relief. Berikut termasuklah perintah bahawa PW2 dikembalikan jawatan sebagai pengarah perayu-perayu pertama, kedua dan ketiga, injunksi untuk menyekat Mathew dan Elain daripada menguruskan tanah-tanah tertentu, ganti rugi untuk kerugian yang dialami akibat tindakan mereka dan perintah agar Mathew mengembalikan saham Tekala kepada KCHSB atau membayar ganti rugi kerana penukaran secara salah mereka itu. Plaintif-plaintif juga memohon deklarasi bahawa: (i) KCHSB adalah pemegang saham dan benefisiari sah saham keluaran perayu-perayu pertama dan kedua; (ii) KCHSB dan/atau perayu pertama adalah pemegang saham dan benefisiari sah 80% daripada saham keluaran perayu kedua; dan (iii) KCHSB dan/atau perayu kedua adalah pemegang saham dan benefisiari sah saham keluaran perayu ketiga dan 170,000 keluaran saham perayu keenam. Mahkamah Tinggi telah menyampaikan penghakiman kepada responden-responden dalam semua tiga guaman yang didengar bersama. Perayu-perayu telah merayu terhadap keputusan-keputusan Mahkamah Rayuan.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Penyataan-penyataan tuntutan responden-responden masing-masingnya

dengan secukupnya menyatakan dakwaan dan butiran fraud termasuklah elemen-elemen fraud berunsur ekuiti. Di Mahkamah Tinggi perayu-perayu tidak memohon selanjutnya butiran tuntutan dan dalam rayuan-rayuan ini, bantahan tidak ditimbulkan berkaitan keterangan yang dikemukakan bagi pihak responden-responden. Justeru itu, aduan bahawa responden-responden tidak memplid secara spesifik dan memperincikan fraud adalah tanpa merit (lihat perenggan 23, 26, 28–29).

(2) Tiada kesilapan dalam penemuan mahkamah perbicaraan berhubung fakta dan pemakaian undang-undang yang mengawal had masa. Ketiga-tiga guaman telah difailkan dalam tempoh had masa yang ditetapkan (lihat perenggan 38 & 32).

(3) Penemuan fraud oleh mahkamah perbicaraan terhadap perayu-perayu jelas disokong dengan keterangan. Oleh kerana fraud telah dibuktikan, mahkamah tidak perlu mengambil kira pembelaan *non est factum* yang ditimbulkan oleh perayu-perayu (lihat perenggan 64 & 68).

(4) Mahkamah perbicaraan betul dalam memutuskan responden-responden telah membuktikan penukaran 1.6 juta saham Tekala milik KCHSB yang menyalahi undang-undang oleh Mathew (lihat perenggan 71).

(5) Mahkamah Tinggi adalah betul dalam memutuskan inferens bertentangan terhadap perayu-perayu di bawah s 114(g) Akta Keterangan 1950 berhubung kegagalan Elain memberi keterangan semasa perbicaraan. Dia mempunyai kewajipan atau tanggungjawab untuk memberi penjelasan kepada mahkamah bagaimana dia dan Mathew memperoleh milikan bersama keseluruhan tanah ladang itu (lihat perenggan 72–73).]

Notes

For cases on fraud, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6037–6043.

Cases referred to

Ang Hiok Seng v Yim Yut Kiu [1997] 1 CLJ 497, FC (refd)

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41; [1978] 1 LNS 32, PC (refd)

Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal [1997] 2 MLJ 465; [1997] 3 CLJ 189, CA (refd)

Devereaux Holdings Pty Ltd v Pelsart Resources NL & Anor (1986) 4 ACLC 12, SC (refd)

Dr Mahesan & Ors v Ponnusamy & Ors [1994] 3 MLJ 312, HC (refd)

Ellamah d/o Ellapen v Reganathen s/o Komarasamy & Ors [1988] 3 MLJ 121; [1987] 1 LNS 81, HC (refd)

Janet Livingstone Loch and another v John Blackwood Limited [1924] UKPC 45, PC (refd)
Mahima Singh & Ors v Buldev Singh [1975] 1 MLJ 173; [1974] 1 LNS 84, FC (refd)
Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors [1984] 1 MLJ 237; [1983] CLJ (Rep) 254, FC (refd)
Micropack Industries Sdn Bhd, Re [1997] 3 CLJ Supp 459, HC (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)
Piercy v S Mills & Co Ltd [1920] 1 Ch 77, Ch D (refd)
Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh [1997] 2 MLJ 373 ; [1997] 3 CLJ 225, CA (refd)
Smith New Court Securities Ltd v Scrimgeour vickers (Asset Management) Ltd [1997] AC 254, HL (refd)
Superintendent of Lands and Surveys (4th div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181; [2010] 1 CLJ 381, FC (refd)
Tenaga Nasional Bhd v Kesang Trading Sdn Bhd & Ors [2002] 6 MLJ 1; [2002] 7 CLJ 200, HC (refd)
Wee Hood Teck Development Corp Ltd v Messrs Yong & Co [1983] CLJ (Rep) 940, HC (refd)
Zhong Mei Sdn Bhd v Chia Hoon Seng & Ors [2009] 9 CLJ 612, HC (refd)

Legislation referred to

Companies Act 1965 ss 131(1), (5), (7A), (7B), 132(2), 132C(1)(b)
Evidence Act 1950 s 114(g)
Limitation Act 1953 s 29(b)
Rules of the High Court 1980 O 18 rr 7(1), 12, 12(1)(a)
Sabah Limitation Ordinance s 18, Items 11, 77, 97
Sarawak Limitation Ordinance s 18

Appeal from: Suit No S22–24 of 2008 (High Court, Sandakan)

Cyrus Das (Raymond Szetu and Tiong Jia Yi with him) (Baldev Gan & Associates) for the appellants.
Norbert Yapp (Norbert Yapp & Associates) for the respondents.

Low Hop Bing JCA (delivering judgment of the court):

INTRODUCTION

[1] These relatively complex appeals arose from Sandakan High Court Civil Suits No S22–24 of 2008 (Suit No 24) and No S22–26 of 2008 (Suit No 26)

which had been consolidated ('the consolidated suits') and heard jointly with Civil Suit No S22–39 of 2008 ('the Tekala suit'). A

[2] These suits revolve around the parents, their younger son and daughter in law, and family companies, with enormous acreages of plantation land in Sabah, and 1,550,000 shares worth RM8,757,500. The plaintiffs' claims in the consolidated suits are founded on fraud purportedly perpetrated on the parents viz the second and third plaintiffs by their younger son Mathew Kwan Hung Cheong (the fourth defendant) ('Mathew') and his wife, Elaine Gay Chow Song (the fifth defendant) ('Elaine'). B C

[3] In the *consolidated suits*, the parties are:

(a) the first plaintiff, Kwan Chee Hang Sdn Bhd, a private limited ultimate holding company of all the defendant companies ('the Ultimate Holding Co'); D

(b) the second plaintiff, the father Kwan Chee Hang ('PW2') who is the patriarch of the Kwan family and founder of the Ultimate Holding Co;

(c) the third plaintiff, the mother Wong Nyuk Ching ('PW4') who is Kwan Chee Hang's wife and co-founder of the Ultimate Holding Co; E

(d) the fourth defendant, Mathew (DW1);

(e) the fifth defendant, Elaine; and F

[4] Mathew and Elaine control the following defendant companies:

(a) Zung Zang Wood Products Sdn Bhd ('ZZ Wood Products SB');

(b) Zung Zang Holdings Sdn Bhd ('ZZ Holdings SB'), which wholly owns the following subsidiaries: G

(i) ZZ Wood Products SB;

(ii) Zung Zang Plantation Sdn Bhd ('ZZ Plantation SB'); and

(iii) Granright Enterprise Sdn Bhd ('GESB'). H

[5] In *Suit No 24*, the plaintiffs sought:

(a) a declaration that the Ultimate Holding Co is the legitimate and beneficial shareholder of all the issued shares of ZZ Wood Products SB; and an order that the register of members of ZZ Wood Products SB be rectified accordingly; I

(b) a declaration that the Ultimate Holding Co and/or ZZ Wood Products SB are the legitimate and beneficial shareholder of 80% of the issued

shares of ZZ Holdings SB; and an order that the register of members of ZZ Holdings SB be rectified accordingly;

(c) a declaration that the Ultimate Holding Co and/or ZZ Holdings SB are the legitimate and beneficial shareholders of the issued shares of ZZ Plantations SB; and an order that the register of members of ZZ Plantations SB be rectified accordingly;

(d) an order that the plaintiffs be authorised to effect the necessary alterations to the register of members of the respective companies for carrying out such orders into effect;

(e) an order directing that the second plaintiff be reinstated as a director of ZZ Wood Products SB, ZZ Holdings SB and ZZ Plantations SB respectively;

(f) an injunction restraining the fourth and fifth defendants and/or their agents or servants from transferring or dealing with any of the land referred to in para 11 of the statement of claim;

(g) damages for loss suffered as a result of the acts of the fourth and fifth defendants;

(h) such further or other relief as the court deems fit; and

(i) costs on a full indemnity basis.

[6] In Suit No 26, the plaintiffs sought:

(a) a declaration that the Ultimate Holding Co is the legitimate and beneficial shareholder of all the issued shares of ZZ Holdings SB; and an order that the register of members of ZZ Wood Products SB be rectified accordingly;

(b) a declaration that the Ultimate Holding Co and/or ZZ Wood Products SB are the legitimate and beneficial shareholders of 80% of the issued shares of ZZ Holdings SB; and an order that the register of members of ZZ Holdings SB be rectified accordingly;

(c) a declaration that the Ultimate Holding Co and/or ZZ Holdings SB are the legitimate and beneficial shareholders of the 170,000 issued shares of GESB; and an order that the register of members of GESB be rectified accordingly;

(d) an order that the plaintiffs be authorised to effect the necessary alterations to the register of members of the respective companies for carrying out such orders into effect;

(e) an injunction restraining the fourth and fifth defendants and/or their agents or servants from transferring or dealing with any of the land referred to in para 15 of the statement of claim;

(f) damages for loss suffered as a result of the acts of the fourth and fifth defendants;

(g) such further or other relief as the court deems fit; and

(h) costs on a full indemnity basis.

[7] Against Mathew, the sole defendant in the Tekala suit, the plaintiffs sought:

(a) a declaration that the Ultimate Holding Co was at all material times the legitimate and beneficial owner of 1,550,000 shares in Tekala;

(b) an order directing Mathew to return the said 1,550,000 shares or its equivalent to the Ultimate Holding Co forthwith;

(c) alternatively, damages for wrongful conversion in the sum of RM8,757,500 or such other sum as may be awarded by the court;

(d) such further or other relief as the court deems fit; and

(e) costs on a full indemnity basis.

[8] The learned judicial commissioner ('the JC') gave judgments for the plaintiffs as prayed against the defendants. Hence, these appeals by the defendants.

FINDING OF FACTS

[9] There was a full trial. The JC's finding of facts unfolded with the family, in particular the father (PW2), entrusting the management and finance of the Ultimate Holding Co to Mathew as managing director after the elder son Michael (PW1) had relinquished that post in order to look after the Ultimate Holding Co's investments in the Approfit Group of Companies.

[10] During Mathew's tenure as managing director, he caused the Ultimate Holding Co to acquire ZZ Wood Products SB, ZZ Holdings SB, ZZ Plantations SB and GESB as the Ultimate Holding Co's subsidiaries. Using the funds of the Ultimate Holding Co and its subsidiaries, and some bank borrowings, Mathew caused the subsidiaries, ZZ Plantations SB and GESB, to acquire substantial acreage of landed properties for planting oil palm. The father, who is illiterate in the English language, had signed corporate documents, in particular, the circular resolution of 3 June 2003, being under the impression that the acquired landed properties were registered in the name of the Ultimate Holding Co. He was unaware that Mathew had registered the landed properties in the names of the subsidiaries.

[11] Sometime in early 2006, Michael came to know that all the plantation land owned by the Ultimate Holding Co or its subsidiaries were now under the control or ownership of Mathew and Elaine.

[12] Mathew was in the habit of using circular resolutions of directors or members to carry out the companies' transactions. He delayed the completion of the Group Audited Accounts of the Ultimate Holding Co and its subsidiaries, for several years until March 2005.

[13] Without the father's knowledge, Mathew caused ZZ Plantations SB to further acquire 384.37 hectares (949.77 acres) of plantation land in September 2000, thereby bringing the total acreage under ZZ Plantations SB to 2,846.17 acres.

[14] The corporate manoeuvres carried out by Mathew were to the benefit of Mathew and Elaine. The disposal of ZZ Wood Products SB to ZZ Holdings SB and the allotments and transfer of shares were carried out through Mathew's instrumentality.

[15] The fifth defendant, Elaine, did not testify at the hearing of the consolidated suits.

[16] In the Tekala suit, Mathew had wrongfully converted his father's 1,550,000 Tekala shares and pledged them with Peninsular Securities Sdn Bhd (now held by Citigroup Nominees (Tempatan) Sdn Bhd) as securities for facilities granted to Mathew or his order (we shall refer to other relevant facts, where necessary, in our judgment herein).

FRAUD: PLEADING POINT

[17] The defendants' learned counsel, Dato' Dr Cyrus Das (Mr Raymond Szetu and Tiong Jia Yi with him) complained that the plaintiffs have not specifically pleaded and particularised fraud.

[18] Mr Norbert Yapp, learned counsel for the plaintiffs, referred to the statements of claim in the three suits, and argued that fraud was pleaded and particularised.

[19] We would address this pleading point by looking at the averments in the plaintiffs' statements of claim.

[20] In *Suit No S22–24 of 2008*, paras 14–23 of the plaintiffs' statement of claim contain the following averments:

14. … on or about 2.04.1998, the 4th Defendant had *fraudulently caused or procured* the directors of the 3rd Defendant company to make an allotment of 99,900 shares of RM1.00 each in the capital of the 3rd Defendant company in favour of 2nd Defendant company (85,000 shares) and himself (14,900 shares) and thereafter to execute the Form 11 for filing with the Companies Commission of Malaysia.

15. … on or about 30.11.1998, the 4th Defendant further *fraudulently caused or procured* the directors of the 3rd Defendant company to make an allotment of 150,000 shares of RM1.00 each in the capital of the 3ra Defendant company in favour of 2nd Defendant company and thereafter to execute the Form 11 for filing with the Companies Commission of Malaysia.

16. … on or about 30.11.1998, the 4th Defendant again *fraudulently caused or procured* the members of the 3rd Defendant company to pass a special resolution to increase the share capital of the 3rd Defendant company from 100,000 shares to 500,000 shares and thereafter to execute the Form 11 for filing with the Companies Commission of Malaysia.

17. … on or about 25.03.1999, the 4th Defendant *fraudulently caused or procured* the directors of the 3rd Defendant company to make a further allotment of 250,000 shares of RM1.00 each in the capital of the 3rd Defendant company in favour of 2nd Defendant company (190,000 shares) and himself (60,000 shares) and thereafter to execute the Form 11 and Form 24 for filing with the Companies Commission of Malaysia.

18. … on or about 4.06.2003, the 4th Defendant *falsely and/or fraudulently procured* the 2nd and 3rd Plaintiffs and another director, Kwan Huang @ Kwan Huang Cheng to execute a Directors' Circular Resolution of the 1st Plaintiff company purportedly to approve the disposal of the 1st Defendant company to him. At the material time the 4th Defendant had represented to the 2nd and 3rd Plaintiffs that the resolution is to facilitate the sale of the 1st Defendant company to him since the 1st Defendant company had not commenced its wood manufacturing business as originally intended. Being illiterate in the English language and acting upon the faith of the 4th Defendant's said representation and assurance that the resolution was merely to facilitate the sale of the 1st Defendant company to him, the 2nd and 3rd Plaintiffs affixed their signature on the purported Circular Resolution.

19. By a purported Directors' Circular Resolution in writing dated 23.10.2003, the 4th and 5th Defendants purportedly resolved to accept the resignation of the 2nd Plaintiff as a director of the 3rd Defendant company vide an undated letter of resignation. Pursuant to the said purported Circular Resolution dated 23.10.2003, the 4th Defendant *fraudulently prepared and caused to be filed with the Companies Commission of Malaysia the Form 49 on 23.10.2003*, thereby giving the 4th and 5th Defendants absolute control over the Board of the 3rd Defendant company. The 2nd Plaintiff avers that he does not recall having tendered his resignation as a director of the 3rd Defendant company and that his removal as a director was done fraudulently by the 4th and 5th Defendants so as to keep the 2nd and 3rd Defendant company and that his removal as a director was done fraudulently by the 4th and 5th Defendants so as to keep the 2nd and 3rd Plaintiffs in the dark about the status and operations of the 3rd Defendant company.

20. In early 2006, the 2nd and 3rd Plaintiffs discovered that the 4th Defendant had *wrongfully and/or fraudulently caused* the Plaintiff Company to lose control and ownership of the 3rd Defendant company which houses the family company plantation lands referred to paragraph 11 hereinabove.

21. Further, unknown to the Plaintiffs at the material time, the 4th and 5th Defendants had by a purported directors' resolution dated 3.06.2003 already caused the 1st Defendant company to dispose of its 80% shareholding in the 2nd Defendant company to them in equal shares, thereby making them the absolute owners of the 2nd Defendant company and the ultimate shareholders of the 3rd Defendant company. Prior to the purported disposal, the 2nd Defendant company was owned by the 1st Defendant company and the 4th Defendant in the proportions of 80:20.

22. As a result of the 4th and 5th Defendants *fraudulently acquiring* the 80% shareholding in the 2nd Defendant company, *the Plaintiff Company was wrongfully deprived and divested of its entire beneficial interest and shareholding in the 3rd Defendant company* including the ownership of the plantation lands measuring 939.57 hectares.

23. To the best of the Plaintiffs' knowledge and information, the then members of the 2nd Defendant company have not passed any members' resolution for the disposal of the said shares to the 4th and 5th Defendants. (Emphasis added.)

[21] In *Suit S22–26 of 2008*, paras 16–21 of the plaintiff's statement of claim contain the following averments:

16. The Plaintiff company avers that on or about 4.06.2003, the 4th Defendant *falsely and/or fraudulently procured* Mr Kwan Chee Hang, Madam Wong Nyuk Ching and Mr Kwan Hiuang @ Kwan Huang Cheng respectively to execute a Directors' Circular Resolution of the Plaintiff company purportedly to approve the disposal of the 1st Defendant company to him. At the material time the 4th Defendant had represented to them that the resolution is to facilitate the sale of the 1st Defendant company to him since the 1st Defendant company had not commenced its wood manufacturing business as originally intended. Being illiterate in the English language and acting upon the faith of the 4th Defendant's said representation and assurance that the resolution was merely to facilitate the sale of the 1st Defendant company to him, Mr Kwan Chee Hang and Madam Wong Nyuk Ching affixed their signatures on the purported Circular Resolution.

17. In early 2006, the Plaintiff company discovered that the 4th Defendant had *wrongfully and/or fraudulently caused the Plaintiff Company to lose control and ownership of the 3rd Defendant company.*

18. Further, unknown to the Plaintiff company at the material time, the 4th and 5th Defendants had by a purported directors' resolution dated 3.06.2003 already caused the 1st Defendant company to dispose its 80% shareholding in the 2nd Defendant company to them in equal shares thereby making them the absolute owner of the 2nd Defendant company. Prior to the purported disposal, the 2nd Defendant company was owned by the 1st Defendant company and the 4th Defendant in the proportions of 80:20.

19. As a result of the 4th and 5th Defendants *fraudulently acquiring* the 80% shareholding in the 2nd Defendant company the Plaintiff Company was *wrongfully deprived and divested of its entire beneficial interest and shareholding in the 3rd Defendant company* including the ownership of the plantation lands.

20. To the best of the Plaintiffs knowledge and information, the then members of the 2nd Defendant company have not passed any members' resolution for the disposal of the said shares to the 4th and 5th Defendants.

21. The 4th Defendant had, at the Extraordinary General Meeting of the Plaintiff Company held on 12.05.2007, admitted the above *wrongdoings and fraud as particularized above* but the 4th Defendant refused and still refuses to undo the same or carry out the necessary rectifications of the Register of Members. The Plaintiff will refer to the minutes of the said Extraordinary General Meeting at the hearing of this action. (Emphasis added.)

[22] In the Tekala suit, the Ultimate Holding Co's claim against Mathew is for restitution of the 1,550,000 Tekala Shares which were *wrongfully converted* by him and pledged with Peninsular Securities Sdn Bhd (now held by Citigroup Nominees (Tempatan) Sdn Bhd) as securities for facilities granted to him or his order.

[23] It is abundantly clear to us that the plaintiffs' respective statements of claim have sufficiently set out the allegations and particulars of fraud including elements of equitable fraud ie unconscionable conduct.

[24] Order 18 r 7(1) of the Rules of the High Court 1980 provides generally that every pleading must contain, and *contain only*, a statement in a summary form of the material facts on which the pleading relies for his claim but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits. The words 'contain only' emphasise that only facts which are material should be stated in a pleading. O 18 r 7(1) is however subject to O 18 r 12. Order 18 r 12(1)(a) is an exception to O 18 r 7(1) and provides that 'every pleading must contain the necessary particulars of any claim including' eg (a) particulars of any fraud.

[25] The material parts of the plaintiffs' pleadings highlighted above contain averments relating to the fraudulent acts allegedly committed by the fourth defendant and how and why the alleged transactions were fraudulent. The allegations of fraud are supported by particulars, thereby complying with the provisions of O 18 r 12(1)(a). The fourth defendant was holding the position of managing director primarily responsible for the financial affairs of the companies. The plaintiffs' averments must be seen and construed in the context of his fiduciary duties and obligations spelt out in the Companies Act 1965 for directors. In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181; [2010] 1 CLJ 381 (FC), Gopal Sri Ram FCJ (as he then was)

explained that equitable fraud is, essentially speaking, unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence. The fourth defendant is a person in similar circumstances.

[26] The defendants have responded to the plaintiffs' averments by filing their amended defence dated 10 February 2010 in the consolidated suits. At the trial, the defendants were fully armed and did not have to apply to the court for further and better particulars relating to the plaintiffs' respective statements of claim.

[27] In *Ellamah d/o Ellapen v Reganathen s/o Komarasamy & Ors* [1988] 3 MLJ 121; [1987] 1 LNS 81 (HC), Siti Norma Yaakob J (later CJ(M)) held, inter alia, that since no objection to the lack of particulars in the pleadings was raised by counsel for the defendants in the course of the trial, it can be assumed that the defendants have not been in any way prejudiced thereby.

[28] In the instant appeals, the defendants had not objected to the evidence adduced for the plaintiffs. In *Superintendent of Lands and Surveys (4th div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 (SC), Peh Swee Chin SCJ (as he then was) held, inter alia, that the plaintiffs' failure to object to the evidence there and then meant that they were not taken by surprise.

[29] We are of the view that the pleading point raised for the defendant is devoid of merits.

FRAUD: LIMITATION

[30] The defendants relied on circular resolution of 3 June 2003 and argued that its validity would determine the fate of all the prayers sought by the plaintiffs. In this regard, they said that:

(a) the consolidated suits, based on that resolution, were filed in July and August 2008, five years after the event and so is out of time by at least two years and 'shall be dismissed' by reason of the three year limitation prescribed under Item 11 of the Schedule to the Sabah Limitation Ordinance ('Item 77' and 'the Schedule' respectively);

(b) the plaintiffs have failed to discharge the burden of proving that the consolidated suits were brought within the limitation period; and

(c) the father had specifically signed the Ultimate Holding Co's financial statement of account on 15 March 2004 including a statement on the disposal by the Ultimate Holding Co's shareholdings in ZZ Wood Products SB in 2003 for RM100,000.

[31] The plaintiffs supported the JC's finding of facts and application of s 18 of the Sabah Limitation Ordinance (s 18) which is equipollent to s 18 of the Sarawak Limitation Ordinance and s 29(b) of the (Malaya) Limitation Act 1953 ('s 29(b)'). They relied on *Wee Hood Teck Development Corp Ltd v Messrs Yong & Co* [1983] CLJ (Rep) 940 HC; and *Tenaga Nasional Bhd v Kesang Trading Sdn Bhd & Ors* [2002] 6 MLJ 1; [2002] 7 CLJ 200 (HC).

[32] The question that arises for decision under this head is:

> On the facts as found by the JC, was he correct in holding that the three suits were filed within the prescribed limitation period?

[33] Section 18 reads as follows:

> When any person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit —
>
> (a) against the person guilty of the fraud or accessory thereto; or
>
> (b) against any person claiming through him otherwise than in good faith and for a valuable consideration;
>
> *shall be computed from the time when the fraud first became known to the person injuriously affected thereby* or, in the case of the concealed document, when he first had the means of producing it or compelling its production. (Emphasis added.)

[34] In *Wee Hood Teck Development Corp Ltd*, Mohd Yusoff Mohamed J (later SCJ) considered the equipollent s 18 of the Sarawak Limitation Ordinance and held that the statutory period of limitation does not begin to run until the plaintiffs have discovered the fraud occasioned by the defendant as a result of fraudulent concealment and unconscionable conduct. The plea of limitation failed there.

[35] In *Tenaga Nasional Bhd*, there was fraudulent concealment and unconscionable conduct by the first defendant. By virtue of s 29(b), the limitation period was postponed to the date when the plaintiff discovered the fraud. Nik Hashim J (later FCJ) held at p 203b that the plaintiff's action was still within the six year limitation period, and explained that:

> Section 29(b), in particular, was inserted to protect a plaintiff who was ignorant of his right of action in the case of fraudulent concealment, and to overcome the difficulty that the time would otherwise be running against him, unknown to him (see *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69).

[36] In the instant appeals, the JC accepted Michael's evidence that the plaintiffs had only in 2006 discovered the fraudulent acts committed by Mathew, and held that the consolidated suits filed in 2008 were well within the three-year limitation period prescribed in item 77 which reads as follows:

Description of Suit	Period of Limitation	Time from which period begin to run
77. To set aside a decree obtained by *fraud* or other relief on ground of *fraud*	Three years	When the *fraud* becomes known to the party wronged. (Emphasis added.)

[37] Next, the Tekala suit filed in August 2008 was based on the tort of wrongful conversion for which no period of limitation is provided in the Schedule. That being the case, the period of limitation prescribed in Item 97 of the Schedule applies. It is six years from the time when the right accrues ie in 2006 when they plaintiffs came to know of the wrongful conversion occasioned by Mathew and Elaine. Hence, the Tekala suit is well within the six-year limitation period. Item 97 was also relied on and pleaded by the defendants in para 9 of their defence dated 4 February 2009.

[38] We find no error in the JC's finding of facts and his application of the law governing limitation. We answer the aforesaid question in the affirmative.

FRAUD: EVIDENCE

[39] The complex corporate structure which Mathew has carried out during his tenure as managing director of the Ultimate Holding Co, by causing the Ultimate Holding Co to acquire ZZ Wood Products SB, ZZ Plantations SB and GESB as subsidiaries, was only privy to Mathew and Elaine.

[40] With the earnings received from its investments in Kretam Holdings Bhd and Tekala Corporation Bhd, Mathew caused subsidiaries, viz ZZ Plantations SB and GESB, to acquire substantial acreage of land for oil palm plantation. As of December 1997, ZZ Plantations SB had acquired 1,896.4 acres of plantation land. In the reports and accounts of ZZ Plantations SB for the year ended 30 September 1998, it was reported that ZZ Plantations SB purchased fixed assets in the sum of RM2,291,180. The balance sheet recorded a sum of RM1,648,868.00 due and owing to the Ultimate Holding Co, and for the year ended 30 September 1999, a sum of RM1,548,519 was due and owing to the other holding companies respectively. ZZ Plantations SB had obtained banking facilities of RM3,000,000 for working capital and to finance the cultivation of the plantation land. ZZ Plantations SB further acquired 949.77 acres of plantation land in September 2000.

[41] In December 1998, GESB acquired 390.41 hectares (964.7 acres) of plantation land at RM600,000. The reports and accounts of GESB, for the year ended 30 September 2000, revealed a sum of RM721,252.00 due and owing to the Ultimate Holding Co.

[42] The audited financial statements of the Ultimate Holding Co for the year ended 30 September 2000 showed the land value (at cost) was RM4,251,692. As at 30 September 2001, the land value (at cost) was RM4,416,580 and as at 30 September 2002, the land value (at cost) was RM4,809,29. As at 30 September 1999, the total expenditure incurred for the plantation development was RM604,206 and for the financial year ending 30 September 2000, a further expenditure of RM1,285,750 was incurred. For the financial year ended 30 September 2001, a further expenditure of RM865,289.00 was registered. For the financial year ended 30 September 2002, a further expenditure of RM1,049,052 was indicated.

[43] The aforesaid audited accounts showed that the Ultimate Holding Co and/or its subsidiaries had financed the costs of acquisition and development of the plantation land, contrary to the allegation by Mathew that he and Elaine had paid for the costs of the acquisition. The Ultimate Holding Co had issued a corporate guarantee of RM1,000,000 in 1999 to secure banking facilities granted to ZZ Plantations SB. The audited accounts of the Ultimate Holding Co, for the year ended 30 September 2002, revealed that the Holding Co had provided guarantees of up to RM5.6m in the year 2002 for banking facilities granted to its subsidiaries.

[44] Mathew had only finalised the group audited accounts in March 2005, well after Mathew and his wife had surreptitiously diverted the assets of the Ultimate Holding Co and its subsidiaries to themselves in June 2003. The irrefutable evidence is that the non-completion of the group's audited accounts had resulted in the deferment of the presentation of these accounts. Mathew's excuse for not auditing the accounts was the lack of funds, but he admitted during cross-examination that the Ultimate Holding Co was not insolvent at that time and that it was indeed receiving income by way of dividend payments. There was also irrefutable evidence that Mathew had wrongfully retained the Ultimate Holding Co's accounting books, records and minute books. In *Janet Livingstone Loch and another v John Blackwood Limited* [1924] UKPC 45, the Privy Council through Lord Shaw advised that the object of omitting to submit accounts was to keep the petitioners in ignorance of the truth and then to acquire their shares at an undervalue. In the instant appeals, it is Mathew's fiduciary duty as managing director not to mislead the corporators but to provide them with a substantially full and true picture see *Devereaux Holdings Pty Ltd v Pelsart Resources NL & Anor* [1986] 4 ACLC 12 Supreme Court of New South Wales.

[45] Mathews' other corporate manoeuvres include:

(a) in April 1998, allotment of 99,900 shares in ZZ Plantation SB, viz 85,000 shares to ZZ Holdings SB and the balance of 14,900 to Mathew himself;

(b) in November 1998, increasing the share capital of ZZ Plantations SB from 100,000 shares to 500,000 shares vide Directors' Circular Resolution dated 25 November 1998;

(c) allotment of 150,000 shares to ZZ Holdings SB vide members' circular resolution dated 30 November 1998; and

(d) causing ZZ Plantations SB to approve an allotment of 190,000 shares to ZZ Holdings SB and 60,000 shares to himself, allegedly vide Directors' Circular Resolution dated 24 March 1999, but Mathew was unable to produce that resolution, and there was no offer of the shares to the existing shareholders.

[46] In *Mahima Singh & Ors v Buldev Singh* [1974] 1 LNS 84 (FC), Ong Hock Sim FJ (as he then was) held that the act of directors issuing shares without offering them to the existing shareholders was ultra vires the articles of association and null and void. In *Re Micropack Industries Sdn Bhd* [1997] 3 CLJ Supp 459 (HC), Kang Hwee Gee J (later JCA) followed the Federal Court judgment in *Mahima Singh*, and held that failure on the part of the company to offer its existing shareholders the first option of taking up the shares renders the issuance of the shares void.

[47] We are of the view that Mathew was in breach of his fiduciary duties when he made the issuance and allotment of the shares, particularly to himself. It is trite law that the power of the directors to issue shares is a fiduciary power which must be exercised bona fide in the best interest of the company. Hence, all transfers of shares effected subsequent to the share allotments in favour of Mathew and Elaine are null and void.

[48] Mathew had allotted the shares to himself for his own benefit so as to dilute the shareholdings of ZZ Wood Poducts SB and, consequently, of the Ultimate Holding Co. At the material time, the Ultimate Holding Co was the majority shareholder. At the time when ZZ Plantations SB was acquired, the Ultimate Holding Co has 85% equity in ZZ Holdings SB. In fact, there was no documentary evidence to show that Mathew had paid for the said allotment. As a result of the wrongful allotment made by Mathew to himself, the shareholding of ZZ Holdings SB in ZZ Plantations SB was reduced to 56%. Mathew is clearly in a position of conflict of interest when he caused the said allotment of the aforesaid 60,000 shares to himself as stated in [45] (4) above.

[49] Purportedly pursuant to Directors' Circular Resolution dated 2 October 2000, Mathew caused Elaine to be appointed a director of ZZ Plantations SB, although she was not a shareholder in ZZ Plantations SB at the material time. The consent of the majority shareholders, ZZ Holdings SB, was not obtained before the proported appointment was made.

[50] Sometime in July 2001, Mathew also caused another Directors' Circular Resolution of ZZ Plantations SB to be prepared to approve the transfer of 75,000 shares held by ZZ Holdings SB to Elaine, without the knowledge and consent of the Ultimate Holding Co, and without any resolution by the members of ZZ Holdings SB. Mathew's motive is improper and mala fide. In *Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312 (HC), Zakaria Yatim J (later FCJ) declared null and void the allotment of shares made by the directors with improper motive and not in good faith, following *Piercy v S Mills & Co Ltd* [1920] 1 Ch 77 where it was held as follows:

> A power to issue shares in a limited company given to directors for the purpose of enabling them to raise capital when required for the purpose of the company is a fiduciary power to be exercised by them bona fide for the general advantage of the company, and when the company is in no need of further capital, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control, or the control of themselves and their friends, over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders.

[51] As a result of the collective acts of Mathew and Elaine, all the shares of ZZ Plantations SB are now held by Mathew, Elaine and their daughter. ZZ Holdings SB had completely lost control of its shareholdings in ZZ Plantations SB. The disposal by Mathew of the shareholdings belonging to ZZ Holdings SB was clearly carried out fraudulently and in breach of his fiduciary duties as director and managing director.

[52] By Directors' Resolution dated 8 April 1998, Mathew caused approval to be given for the transfer of Mathew's 170,000 shares in GESB to ZZ Holdings SB.

[53] On or about July 2001, Mathew had apparently, without the approval of an AGM or EGM, transferred or caused to be transferred to himself 30,000 GESB shares belonging to ZZ Holdings SB, thereby reducing its shareholding in GESB to 140,000 shares. Prior to the transfer of the said 30,000 shares to Mathew, ZZ Holdings SB owned 85% of the shares in GESB. According to the report from SSM, for the financial year ended 30 September 2006, GESB has fixed assets amounting to RM1,763,782.

[54] Mathew and Elaine have authorised the transfer of 110,000 shares in GESB to Elaine, although GESB was initially 85% owned by ZZ Holdings SB. This transfer of shares constituted a substantial disposal of assets requiring a members' resolution to be passed. In the absence of a members' resolution, the transfer is null and void being in breach of s 132C(1)(b) of the Companies Act 1965, which reads:

> *Approval of company required for disposal by directors of company's undertaking or property:*
>
> 132C(1) Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for —
>
> (a) …
>
> (b) the disposal of a substantial portion of the company's undertaking or property,
>
> which would materially and adversely affect the performance or financial position of the company, unless the proposal or transaction has been approved by the company in general meeting.

[55] In *Zhong Mei Sdn Bhd v Chia Hoon Seng & Ors* [2009] 9 CLJ 612, Vernon Ong Lam Kiat JC (now J) held that the directors' resolution to transfer the asset was of no effect because there was no shareholders' resolution approving the transfer, thereby occasioning a breach of s 132C(1).

[56] In relation to the fraudulent disposal of ZZ Wood Products SB to ZZ Holdings SB for RM100,000 on or about 3 June 2003, Mathew had caused the other directors of the Ultimate Holding Co to sign a Directors' Circular Resolution to approve the disposal. This circular resolution was prepared under Mathew's direction, without any explanatory notes to inform the intended signatory thereof as to its effect. There is no mention whatsoever that the plantation land was being transferred or dispossessed from the subsidiaries and the Ultimate Holding Co. At the material time, the parents and Michael were not aware that the entire shareholdings had on the same date been transferred to Mathew and Elaine vide a purported Directors' Circular Resolution signed by both of them. Since ZZ Plantation SB and GESB were the wholly owned subsidiaries of ZZ Holdings SB at the material time, effectively Mathew and Elaine had become the controlling shareholders of the plantation land at a mere consideration of RM100,000. The father who is familiar with the oil palm industry has testified that the plantation land is worth RM40m based on the current value.

[57] As managing director, Mathew must make full disclosure of all the material facts to the board. Mathew also owes the Ultimate Holding Co and its subsidiaries a fiduciary duty not to make an unauthorised profit from his

position. Disclosure requirements are not confined to the nature of the director's interest; they extend to disclosure of its extent, including the source and scale of the profit made from his position, so as to ensure that the shareholders are fully informed of the actual position. Failure to do so amounts to a breach of s 131(1), (5), (7A) and (7B) of the Companies Act 1965, in the following words:

> (1) Subject to this section, every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall, as soon as practicable after the relevant facts have come to his knowledge, declare the nature of this interest at a meeting of the directors of the company.
>
> (5) Every director of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict.
>
> (7A) *For the purpose of this section, an interest of the spouse of a director of a company* (not being herself or himself a director of the company) and an interest of a child, including adopted child or stepchild, of a director of the company (not being himself or herself a director of the company) in the shares or debenture of the company, *shall be treated as an interest in the contract and proposed contract.*
>
> (7B) *Where a contract or proposed contract is entered into in contravention of this section, the contract or proposed contract shall be voidable at the instance of the company* except if it is in favour of any person dealing with the company for any valuable consideration and without any actual notice of the contravention. (Emphasis added.)

[58] Without the consent or ratification of a general meeting, the circular resolution is also null and void, being in contravention of s 132(2) of the Companies Act 1965 which reads:

> (2) A *director* or officer or a company shall not, *without the consent or ratification of a general meeting* —
>
> (a) use the property of the company;
>
> (b) *use any information acquired by virtue of his position as a director or officer of the company*;
>
> (c) *use his position as such director or officer*;
>
> (d) *use any opportunity of the company which he became aware of, in the performance of his functions as the director or officer of the company*; or
>
> (e) engage in business which is in competition with the company,

to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company. (Emphasis added.)

[59] We note, as the JC has noted, that the father was 81 years old at the time of the trial. He was frail looking and sickly. He attended each and every sitting of the trial to complete his evidence. Being the founder of the family business, he brought Mathew into the family business. He gave Mathew an overseas education and credited him with a master's degree in business administration, besides substantial shares in the family business. He appointed Mathew to manage all the family companies. The JC also observed the father's demeanour, anger, disappointment and bitterness at being cheated by Mathew. He found the father to be honest and straightforward witness, albeit a bit inconsistent due to his memory lapse, confusion, old age and ill health. There was no reason for the father to lie at all, especially at his advanced age and poor health.

[60] The JC also found the mother, the third plaintiff, to be a truthful witness.

[61] On the other hand, in observing Mathew's demeanour, the JC found that Mathew was not a witness of truth, being evasive, even though the questions were simple and straightforward. Mathew evaded questions when he considered true answers would be damaging to his case. His evidence consisted of inconsistencies and hence neither credible nor truthful. Mathew's modus operandi involved using directors' or members' circular resolutions to carry out the company's transactions for the obvious reasons of avoiding the attendance of his parents and other directors or shareholders who would otherwise be in a position to question and seek clarifications from Mathew on the nature and purpose of the proposed resolutions.

[62] Mathew was principally responsible for the financial management of the Ultimate Holding Co and its subsidiaries. His acts or omissions in deliberately delaying the completion of the group audited accounts for several years is, to say the least, mala fide. The accounts for the years from 30 September 1998–30 September 2003 were only finalised in March 2005. They were not audited in time because Mathew did not want to run the risk of exposing his own wrongdoings and misdeeds to the other family members at the AGM of the Ultimate Holding Co.

[63] It is settled law that an appellate court will generally not disturb or interfere with the finding of facts made by a trier of facts in the court of first instance, particularly on the issue of credibility unless that finding is not supported by evidence; or is against the weight of evidence; or there was no proper judicial appreciation or evaluation of the evidence; or there was misdirection in law; or the trial court has fundamentally misdirected itself. The

burden of showing that the JC was wrong lies on the defendants, such as Mathew in the instant appeals. The defendants must establish that the JC was plainly wrong. There is a long line of authorities setting out this proposition. See eg *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal* [1997] 2 MLJ 465; [1997] 3 CLJ 189 (CA), per Gopal Sri Ram JCA (later FCJ); *Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* [1984] 1 MLJ 237; [1983] CLJ (Rep) 254 (FC) per Wan Suleiman FC (as he then was); *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373 ; [1997] 3 CLJ 225 (CA), per Gopal Sri Ram JCA (later FCJ); *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41; [1978] 1 LNS 32 (PC) per Lord Fraser; and *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, at pp 274H–275A HL per Lord Steyn. However, the defendants have failed to discharge the said burden.

[64] On the issue of fraud, we must stress that the existence of fraud is a question of fact to be decided upon the circumstances of each particular case: *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 (FC), per Raja Azlan Shah CJ (Malaya) (now HRH the Sultan of Perak). In this regard, the JC's finding of fraud against the defendants is clearly supported by the evidence adduced before him.

FRAUD AND NON EST FACTUM

[65] The defendants' learned counsel argued that Mathew had put forward the corporate documents for his parents to sign and the parents have duly signed them, as a result of which the parents could not rely on the defence of *non est factum* for the purpose of setting aside the transactions which were effected based on those documents.

[66] The plaintiffs' learned counsel responded that where fraud has been established, the issue of *non est factum* requires no further consideration.

[67] The question raised herein calls for a consideration and determination of the relationship between fraud and *non est factum*. That question may be formulated as follows:

> Where fraud has been established, is it still necessary for the court to consider the defence of *non est factum*?

[68] The answer, which is in the negative, has been given in the authoritative judgment of the Federal Court in *Ang Hiok Seng v Yim Yut Kiu* [1997] 1 CLj 497. At p 513i, Mohd Azmi FCJ (as he then was), speaking for the Federal Court, held that in view of the court's conclusion on the issue of fraud, there is no necessity for the court to deal with the defence of *non est factum*. Applying

this principle to the instant appeals, where fraud has been established against Mathew, it is unnecessary for us to deal with the defence of *non est factum* raised for the defendants.

DERIVATIVE ACTION

[69] The defendants contended that the JC had failed to apply the principles relating to a derivative action. Our short answer is that a derivative action concerns a minority shareholders' action. It is inapplicable here as the Ultimate Holding Co is a majority shareholder.

THE TEKALA SUIT

[70] In the Tekala suit, Mathew did not deny that the Tekala shares belonged to the Ultimate Holding Co. However, he claimed that he had the Ultimate Holding Co's consent to pledge the shares and/or the Ultimate Holding Co was aware of the pledge as it was reflected in the Ultimate Holding Co's audited accounts for the year 1998 onwards. However, Mathew was unable to produce the so-called consent. Next, the 1998 audited accounts including the financial statement for the year ended 30 September 1998 was only finalised on 15 March 2005, and so the other directors were not aware of Mathew's wrongful acts in 1998.

[71] We are of the view that the JC was correct in holding that the plaintiff has proved Mathew's wrongful conversion of the 1,550,000 Tekala shares belonging to Ultimate Holding Co.

ELAINE'S FAILURE TO TESTIFY

[72] Elaine's the fifth defendant's failure to testify as a witness in the consolidated suits has led the JC to draw an adverse inference under s 114(g) of the Evidence Act 1950. In our view, there is a duty or obligation on her part to explain to the court how she and Mathew had acquired joint ownership of the entire plantation land. The consequences flowing from the failure of a defendant (or a party) to testify had been succinctly stated by Gopal Sri Ram FCJ (as he then was) in *Takako Sakao*, as follows:

> Two consequences followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. Firstly, the evidence given by the appellant ought to have been presumed to be true. The judge was under a duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. His failure to direct himself in this fashion thereby occasioned a serious miscarriage of justice. Secondly, the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms

of the mutual understanding or agreement that she had with the first respondent. The trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point amounted to a misdirection which occasioned a miscarriage of justice.

[73] In the circumstances, we are of the view that the JC was right in drawing an adverse inference against the defendants under s 114(g). Conversely, had the JC failed to do so, that omission would have constituted a misdirection, occasioning a miscarriage of justice.

CONCLUSION

[74] On the foregoing grounds, we hold that the JC was correct in giving judgments for the plaintiffs in all the three suits. There is no reason for us to intervene. These appeals being wholly without merits are hereby dismissed with global costs of RM80,000. The judgments of the High Court are affirmed. Deposits to the respondents (the plaintiffs) on account of the fixed costs.

Appeals dismissed with costs.

Reported by Ashok Kumar